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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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MAY 26 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of the
Telecommunications Act
of 1996:)

CC Docket No. 96-115

Telecommunications Carriers'
Use of Customer Proprietary
Network Information and
Other Customer Information)

**PETITION FOR RECONSIDERATION OF
THE INDEPENDENT ALLIANCE**

The Independent Alliance (the "Alliance"), by its attorneys, and pursuant to Section 1.429 of the Commission's Rules,¹ respectfully submits this Petition for Reconsideration of the Commission's Second Report and Order and Further Notice of Proposed Rulemaking ("*Second Report and Order*"), released February 26, 1998.

I. Introduction

The Alliance is a group of small, rural telecommunications companies that share common concerns regarding the cost and complexity of implementing the two aspects of the *Second Report and Order* requiring the development and implementation of specific computer programming protocols. The nation's small and rural communications businesses can comply fully with Congressional directives to protect Customer Proprietary Network Information ("CPNI") without resorting to the elaborate and expensive software adaptations required by the

¹ 47 C.F.R. § 1.429.

Second Report and Order. Because a substantial number of small and rural carriers are affected, requiring each small or rural communications company to seek waiver of the computer-driven CPNI protection mechanisms would constitute a waste of public and private resources. Accordingly, the Alliance respectfully requests that the Commission reexamine its decision in this proceeding and exempt small and rural carriers from the provisions of Sections 64.2009(a) and (c) of the Commission's Rules, which require electronic "flags" on customer service records to indicate the customer's CPNI approval and current service status, and electronic "tags" to track and record instances of access to customer records. In support thereof, the Alliance shows the following:

II. The CPNI software flags and electronic audit safeguard mechanisms are unnecessary, overly burdensome, and potentially technically infeasible for small and rural telecommunications businesses.

The Commission adopted five specific safeguards regarding the use of CPNI.² In addition to requiring the establishment of personnel training and disciplinary processes,³ the establishment of record-keeping requirements and supervisory review for outbound marketing practices,⁴ and annual certification procedures,⁵ the Commission mandated two specific computer-driven mechanisms: (i) the development and implementation of software "flags" that indicate "within the first few lines of the first screen of a customer's service record the

² *Second Report and Order* at paras. 198-201.

³ 47 C.F.R. § 64.2009(b).

⁴ 47 C.F.R. § 64.2009(d).

⁵ 47 C.F.R. § 64.2009(e).

CPNI approval status and reference the customer's existing service subscription,"⁶ and (b) the institution of "tags," or the maintenance of "an electronic audit mechanism that tracks access to customer accounts, including when a customer's record is opened, by whom, and for what purpose."⁷

These "flags" and "tags" are not required by Congress, nor are they necessary to meet Congressional directives that carriers protect customer privacy. The protection of CPNI may be achieved more efficiently and more practicably by the nation's small and rural telecommunications businesses through less burdensome means. Specifically, the Alliance submits that compliance with the provisions of Sections 64.2009(b), (d) and (e) alone will ensure the protection of CPNI.

A. "Flags" and "tags" are unnecessary to implement the Congressional mandate.

Congress clearly defined the limitations of carriers' use of CPNI⁸ and the duty of carriers to protect the confidentiality of proprietary information.⁹ Although the computer-driven "flags" and "tags" adopted in the *Second Report and Order* may constitute one of many available methodologies for implementing these requirements, these methods are

⁶ 47 C.F.R. § 64.2009(a).

⁷ 47 C.F.R. § 64.2009(c). This rule section also requires the maintenance of "these contact histories for a minimum period of one year."

⁸ "[A] telecommunications carrier . . . shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service" 47 U.S.C. §222(c)(1).

⁹ 47 U.S.C. § 222(a).

neither required by Section 222 nor necessary to effect Congressional intent.

"Flags" and "tags" are computerized tracking systems which may be appropriate and effective in the context of large organizations with multiple management levels and a large personnel force which is strictly segregated according to function. In smaller organizations, such as those represented by Alliance members, access to and use of sensitive customer information traditionally has been limited in a variety of ways, which may include some reliance upon computer tracking.

In smaller organizations, however, managers have relied principally upon employee training and supervision. The Alliance submits that these tools, which comprise two of the five CPNI protective devices ordered by the Commission, will, when combined with the remaining non-computer driven mechanism of annual certification and reporting, ensure that customers' privacy is respected and protected. The sufficiency of these mechanisms, together with the significant difficulties and costs involved in implementing "flags" and "tags," as demonstrated below, constitute sufficient grounds for the Commission's reconsideration of the application of these requirements to small and rural telecommunications companies. There being no statutory mandate for adoption of any specific implementation tools, efficiency and efficacy require that small and rural telecommunications carriers be free to adopt the procedures which are best suited to individual company business operations.

The Alliance is not seeking forbearance from Section 222 obligations, recognizing

fully that the privacy interests of the customers of small and rural carriers warrant protection.¹⁰ The Alliance respectfully submits, however, that Section 222 obligations may be fulfilled by the nation's small and rural carriers without resort to overly burdensome, impractical and costly methods. For small and rural telecommunications businesses, personnel training, supervisory review, corporate certification safeguards are sufficient to ensure the protection of CPNI.

B. "Flags" and "tags" are overly burdensome.

In assessing the impact of implementing "flags" and "tags," the operations of the small and rural telecommunications companies in this country should not be equated with the activities of regional or national telecommunications carriers, or even with the operations of individual urban carriers that may benefit from the economies afforded by the density of subscriber bases. Efficient and efficacious management techniques differ dramatically between larger and smaller operations.

Smaller and rural companies generally employ fewer people, and individual employees generally are responsible for multiple tasks. Management generally is less reliant on computerized administrative mechanisms to ensure performance on a variety of levels because, in the absence of economies of scale, computerized mechanisms are not cost efficient. Accordingly, management is less likely to rely on computerized mechanisms to ensure that corporate information is protected.

The Commission, however, in assessing the impact of its "flag" and "tag" rules,

¹⁰ See *Second Report and Order* at para. 236: "we decline to forbear from applying section 222(c)(1) to small carriers because we are unpersuaded that customers of small businesses have less meaningful privacy interests in their CPNI."

focused only on the computer-driven methodologies already implemented by larger carriers, and determined that, with respect to these carriers, enhancements to existing computer-driven methodologies would not be overly burdensome. Specifically, the Commission focused on the effectiveness and feasibility of Computer III CPNI safeguard requirements.¹¹ The Commission stated that "carriers had indicated their computer systems could be easily modified to accommodate the flags,"¹² citing the same parties that were subject to the Computer III requirements.¹³ Similarly, the Commission's enactment of the audit mechanism was accompanied by the observation that "[s]uch access documentation will not be overly burdensome because many carriers maintain such capabilities to track employee use of company resources for a variety of business purposes unrelated to CPNI compliance, such as to document the volume of computer and data base use, as well as for personnel disciplinary measures."¹⁴ Again, the Commission cited the parties subject to the Computer III requirements.¹⁵

The nation's small and rural telecommunications carriers are not subject to Computer III requirements. The Commission's conclusion that all carriers should be required to implement the same computer driven CPNI safeguard mechanisms ignored the distinct operational circumstances of smaller and rural carriers. The record does not reflect the

¹¹ *Second Report and Order* at para. 190. AT&T, GTE, and BOCs are the only carriers subject to Computer III requirements. *Id.* at para. 176.

¹² *Id.* at paras. 198-199.

¹³ *Id.* at nn. 689, 692.

¹⁴ *Id.* at para. 199.

¹⁵ *Id.* at n.692.

Commission's consideration of the necessity or feasibility for small and rural carriers to implement the CPNI software "flags" and "tags." Having failed to consider the impact on small and rural carriers, it is inappropriate to subject them to the same requirements as larger carriers with existing systems that can be modified easily to accommodate the computer driven CPNI safeguard mechanisms.

Implementation of "flags" and "tags" for small and rural communications companies generally will require substantial time, effort and expense in reprogramming or developing new software programs. Members of the Alliance have estimated that it will cost between \$150,000 and \$200,000 to implement CPNI "flags" and "tags." Additional memory will also be required. For smaller companies, this expense represents an extraordinarily high per-subscriber cost.¹⁶

In contrast, larger telecommunications carriers are able to spread the implementation costs across more customers. Clearly, the relative financial burden on smaller and rural communications companies in complying with the "flag" and "tag" CPNI safeguard requirements is significant. In the context of other protective mechanisms, it is unclear that customer privacy protection is significantly enhanced by the addition of "flag" and "tag" software. As demonstrated herein, the public interest benefits to be derived from this substantial expenditure are outweighed by the costs of complying with the requirements.

C. Year 2000 issues may render programming solutions technically infeasible.

Any current discussion of programming solutions must take into consideration issues

¹⁶ For example, one member of the Independent Alliance serves 3,600 customers. Thus, the average cost per customer for this carrier is between \$42 and \$56.

associated with Year 2000 problems. Given the extensive reprogramming requirements that "flag" and "tag" obligations will impose on many small and rural carriers,¹⁷ implementation of the software safeguards within 8 months simply may not be feasible. This concern is heightened because Year 2000 problems have created a shortage of trained programmers generally.

The Commission has recognized the significance that Year 2000 issues have for the entire industry.¹⁸ Given that implementation of "flag" and "tag" solutions is more difficult, more costly and more time-consuming for small and rural carriers than the Commission may have perceived, the additional complication of Year 2000 issues clearly warrants the requested exemption for small and rural carriers.

III. Exemption is preferable to individual waivers to conserve public and private resources.

Anticipating the significant hardship which would be encountered by some small and rural carriers, the Commission stated:

although we believe different rules are not generally necessary for small and rural carriers, we note that such carriers may seek a waiver of our new CPNI rules if they can show that our rules would be unduly burdensome, and propose alternative methods for safeguarding the privacy of their customers

¹⁷ The problems are pervasive and well-known. For example, The Washington Post reported that "U.S. businesses are likely to spend at least \$50 billion fixing Year 2000 computer glitches." Rajiv Chandrasekaran, *A \$50 Billion 'Bug'*, Washington Post, April 29, 1998, at A01. "Making computer systems understand the year 2000 is proving a Herculean task" and the event is "unlikely to be trouble free." *Id.*

¹⁸ See FCC Announces Initiatives on Year 2000 Computer Date Issue; Commissioner Powell to Represent FCC on President's "Council on Year 2000 Conversion," FCC News (April 16, 1998); see also William E. Kennard, Statement of William E. Kennard to Senate Committee on Commerce, Science, and Transportation on Year 2000 Computer Date Issue (April 28, 1998).

consistent with section 222.¹⁹

As the Alliance has demonstrated, the Commission's evaluation of the burdens associated with implementation of "flag" and "tag" mechanisms was based upon the existing capabilities of large companies.²⁰ Accordingly, exemption is warranted for small and rural carriers.

Where administrative decisions are of general prospective applicability, rulemaking is the appropriate agency action.²¹ In addition, the public interest would be served by the conservation of public and private resources which would occur upon the Commission's general finding that exemption is appropriate.

The Commission historically has recognized the rationality of distinguishing its regulatory treatment of small carriers to ensure that the public interest is served.²² Given that CPNI is properly protected by small and rural carriers' compliance with the other safeguard mechanisms, the Commission should exempt these carriers from the burdens of the "flag" and "tag" mechanisms.

¹⁹ *Second Report and Order* at para. 194.

²⁰ "We remain unconvinced that the burdens of section 222 are so great on small carriers that they cannot comply Indeed, the mechanisms we require expressly factor commercial feasibility and practice into an appropriate regulatory framework We also find that the use of an electronic audit mechanism to track access to customer accounts is not overly burdensome because many carriers already maintain such capabilities for a variety of business purposes unrelated to CPNI" *Id.* at para. 238 (emphasis supplied).

²¹ 5 U.S.C. § 551(4).


²² See, e.g., *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20,541, 20,616 (1996); *Memorandum Opinion and Order* (rel. April 3, 1998). *In the Matter of Provision of Access for 800 Service, Memorandum Opinion and Order* 86-10, 6 FCC Rcd 5421 at 5426 (1991) citing *Report and Order*, 4 FCC Rcd at 2829, n.90.

IV. Conclusion

The imposition of the Commission's "flag" and "tag" rules on small and rural telecommunications companies will require the dedication of scarce resources without corresponding public benefits. The "flag" and "tag" requirements are not necessary to ensure compliance with Congressional directives. Because the protection of CPNI may be accomplished through less burdensome means, the Alliance respectfully requests the Commission to exempt small and rural telecommunications companies from the application of Sections 64.2009(a) and (c) of the Commission's Rules.

Respectfully submitted,

The Independent Alliance

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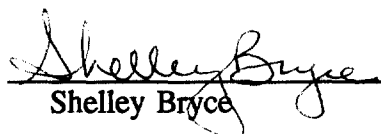
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May 26, 1998

CERTIFICATE OF SERVICE

I, Shelley Bryce, hereby certify that a copy of the foregoing "Petition for Reconsideration of the Independent Alliance" was served on this 26th day of May 1998, by hand delivery to the following parties:


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